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F I S C A L I M P A C T R E P O R T

SPONSOR: Coll DATE TYPED: 03/04/01 HB 62/aHLHRC/HJC

SHORT TITLE: Employee Protection Act SB

ANALYST: Dunbar

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
See Narrative					

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Department of Labor
Attorney General's Office
State Personnel Office (SPO)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendments include some clean up language and the following significant changes:

- Section 4A is amended to add that an employer cannot retaliate against an employee who disclosed information on the grounds that they believe in good faith that the employer committed an improper act of public concern.
- Section 5 is amended to add agent of employee to the prohibition of employer blacklisting.
- Section 6A is amended to provide the same administrative procedure relative to the time for filing a charge contained in the Human Rights Act. The time for filing a charge is changed from 60 to 180 days.
- Section 6H removes language pertaining to "urgent medical condition" since the term was not used in the legislation .
- Section 6I adds language that if the complainant prevails in a litigation effort, that the court may award actual damages, punitive damages and attorney fees. It also subjects the state, as an employer, to the same liability.

Synopsis of HLHRC Amendment

The House Labor and Human Resources Committee amendment provides for the same administrative procedure relative to the time for filing a charge contained in the Human Rights Act. The time for filing a charge is changed from 60 to 180 days. The second amendment removes language pertaining to "urgent medical condition" since the term was not used in the legislation.

Synopsis of Original Bill

HB 62 seeks to protect employees from retaliation by public and private employers when the employee reports an illegal act of public concern. The bill encourages employees to report these illegal acts in order to protect the public and employees and to assist public bodies charged with ensuring adequate safety and health standards.

HB 62 codifies an area of the common law that assigns financial liability to employers that retaliate against workers who report matters of public concern in the workplace to regulatory authorities.

Significant Issues

HB 62 provides for due process if an individual believes they have been retaliated against by filing a charge with the Human Rights Division (HRD). Currently under the provisions of the Human Rights Act, HRD investigates the charge and issues a decision of cause or no probable cause. If probable cause is found, a hearing may be held before the Human Rights Commission. Appeal to the district court is available.

The Attorney General's Office notes that HB 62 would make significant strides in creating certainty in the area of whistle blowing protection. If HB 62 is not enacted, people will continue to seek redress in the courts for any incidents of retaliation for whistle blowing. This is a catch-as-catch-can system that has proven to work, but is also inefficient. Thus, the failure to enact HB 62 would deprive the public of the early resolution the Human Rights Division achieves through its investigation and conciliation process. HB62 would also likely relieve the courts.

The State Personnel Office observes that the bill does not contain a provision to penalize employees who abuse their rights under this act.

FISCAL IMPLICATIONS

The bill does not contain an appropriation. See Administrative Implications.

ADMINISTRATIVE IMPLICATIONS

According to the Department of Labor (DOL) at least one FTE, a civil rights specialist would be needed to implement the program. DOL also notes that a staff training position may be required.

DOL maintains that the provisions under this bill are broader and therefore will impose significant additional burdens on HRD and Commission to investigate and resolve claims.

The Attorney General assigns an assistant attorney general to the Human Rights Division and two to the HRC, and would likely need to assign at least one-half FTE to the Commission because of the increased caseload.

The bill provides for an administrative process for whistleblowing claims that will require DOL to administer.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

DOL notes that the bill may conflict and overlap with existing state and federal law. DOL indicates that "improper acts" as defined in the bill are covered in other legislation, including OSHA, Workers Compensation, and the First Amendment to the US Constitution for public employees. DOL mentions the NM courts have also established a whistleblower claim that is similar to what is intended in the bill.

HB 62 provides the same administrative procedure for redress as currently available under the Human Rights Act except the time for filing a charge under this bill is 60 days of the alleged violation rather than within 180 days as is otherwise allowed. This could create confusion with the staff and employees.

TECHNICAL ISSUES

The bill defines "urgent medical condition" without that term being used in the legislation.

AMENDMENTS

The bill should be amended to make the time for filing with HRD the same as provided in the Human Rights Act.

OTHER SUBSTANTIVE ISSUES

The Attorney General's Office maintains that Section 4 of HB 62 gives rise to the following issues:

1. The first issue is the scope of applicability of HB 62; i.e., what activities Section 4 protects, is not clear. Initially, it is clear that Section 4 generally protects workers from retaliation for addressing their employers' "improper acts," which term Section 3 defines as acts contrary to statutes or regulations. Workers historically seek redress for this type of retaliation in the courts on a case by case basis. The courts then analyze whether the particular employer act was of substantial public concern for the courts to address. HB 62 specifically defines a substantial improper act for the to address. However, the courts have also protected workers from reporting such matters as ethical violations and matters against public policy as embodied in case law. HB 62 does not address these types of improper acts. It is unclear whether the case law that does address them is valid or would be supplemental to the protections of HB 62.

2. The differences between Section 4 provisions in HB 62 are not clear. Specifically Section 4(A) protects workers against reporting or threatening to report an "improper act of public concern." Sections 4(B) and (C) protects workers from participating in government oversight of an "improper act" or refusal to participate in an employer's "improper act." The addition of

the words "of public concern" to Section 4(A) may mean that HB 62 protects workers from disclosure or threatened disclosure of only those statutory or regulatory violations that are of public concern, but not disclosure or threatened disclosure of those violations that are not of public concern. This subset of improper acts may include such matters as employee drug use, inappropriate accounting practices and the like that are significant to the employer but are not considered significant to the public at large.

3. The consistency of HB 62 to the current HRC procedures is also an issue. The HB 62 Section 6 grievance procedure and Section 7 hearing procedure are consistent with the overall complaint, investigation, conciliation and then hearing process that currently exists for processing anti-discrimination matters. However, under existing law all orders regarding anti-discrimination statutes, whatever the outcome, are appealed to the district courts *de novo*. This means once the appeal is filed in district court can be the parties have the right to start anew as if the administrative determination never took place. This is consistent with the anti-discrimination laws across the country and in the federal system, including retaliation prohibitions under the anti-discrimination laws of New Mexico. Unlike these anti-discrimination statutes, HB 62 Section 9 directs parties to appeal pursuant to the procedures found in NMSA 1978, Section 39-1-1.1.

4. The AG Office mentions that it is likely legitimate to treat appellants under HB 62 and appellants under the anti-discrimination statutes differently. However, HB 62 is also inconsistent with the Supreme Court's Rule 1-076, NMRA 2000, which prescribes the method of appeals from the HRC. This court rule states it is applicable to *de novo* appeals from the Commission. This could exclude appeals under Section 39-1-1.1 arising out of HB 62 matters. However, if the Court is confronted with a circumstance in which HB 62 is inconsistent with Rule 1-076, the Court will most likely conclude its own procedural Rule 1-076 takes precedence over HB 62.

BD/ar:prr:njw